UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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POWER UP LENDING GROUP, LTD.,

Plaintiff,

-against

NORTH AMERICAN CUSTOM SPECIALTY VEHICLES, INC. A DE CORPORATION D/B/A NACS VEHICLES, INC. A SUBSIDIARY OF GLOBAL DIGITAL AND GLOBAL DIGITAL SOLUTIONS, INC. AND JEROME J. GOMOLSKI,

Defendants.

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REPORT
AND RECOMMENDATION
16-CV-1025 (ADS) (AYS)

ANNE Y. SHIELDS, United States Magistrate Judge:

Plaintiff Power Up Lending Group, Ltd. ("Power Up" or "Plaintiff") brings this action for breach of contract and fraud against defendants North American Custom Specialty Vehicles, Inc. ("North American"), Global Digital Solutions, Inc. ("Global"), and Jerome J. Gomolski ("Gomolski") (collectively, "Defendants"), to recover amounts owed pursuant to two factoring agreements and guaranties.

The case was commenced in March of 2016. See Compl., Docket Entry ("DE") [1]. Defendants failed to answer and Plaintiff thereafter requested entry of a certificate of default. See DE [7]. The Clerk of the Court noted the default, DE [8], and Plaintiff has moved for entry of judgment thereon. See Mot. Default J., DE [9]. Presently before this Court is the District Court's referral of the Plaintiff's motion for issuance of a Report and Recommendation as to whether Plaintiff has established Defendants' liability such that the motion should be granted, and if so, to determine (1) the relief to be granted, (2) whether damages should be awarded, including reasonable attorney's fees and costs, and (3) whether any other relief should be granted. DE [10].

For the reasons set forth below, this Court recommends entry of judgment on behalf of Power Up and that a judgment awarding damages in the amount of $109,302.79 be entered against Defendants.

BACKGROUND

I. Facts

The following facts are adduced from Plaintiff's Complaint, the affidavit of Curt Kramer ("Kramer Aff."), and the exhibits attached thereto, and are undisputed and taken as true for purposes of deciding this motion. See Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992) (citations omitted).

A. The Parties and Factoring Agreements

Plaintiff Power Up is a corporation organized and existing under the laws of the Commonwealth of Virginia doing business in the State of New York. See Compl. ¶ 8. Defendant North American is a Delaware corporation doing business in Florida, Defendant Global is a New Jersey corporation with an office in Florida, and Defendant Gomolski is a resident of Florida. See Compl. ¶¶ 9-11. As set forth below, North American, made, executed, and delivered to Power Up two factoring agreements in October 2015; the first on October 1, 2015 ("October 1 Agreement") and another on October 23, 2015 ("October 23 Agreement"). See Compl. ¶¶ 14, 44. Payments for both Agreements are guaranteed by Global. See Compl. ¶¶ 30, 59; Kramer Aff. ¶¶ 4, 9, DE [9-1].

B. The October 1 Agreement

The October 1 Agreement provided for an initial advance of $59,000 by Plaintiff, and for Defendants to repay $76,700, with a specific daily repayment of $456.55. Compl. ¶ 15. The Agreement provided that North American would make the daily repayments via a system titled

"ACH," which would automatically and electronically withdraw the daily amount from a designated bank account of North American and transmit that amount to Plaintiff's designated bank account. Compl. ¶ 17. The Agreement also provided that North American's failure to electronically remit the daily repayment amount on more than three occasions would automatically put North American in default under the Agreement. Compl. ¶ 18. Such default would entitle Power Up to exercise all of its remedies under the Agreement, including the immediate repayment of the remaining balance on the repayment amount and additional charges and fees described therein. Id. This Agreement was guaranteed by Global on its face. Compl. ¶ 15.

C. The October 23 Agreement

The October 23 Agreement provided for an initial advance of $50,000 by Plaintiff, a repayment amount by Defendants of $69,000, and a specific daily repayment amount of $547.62. Compl. ¶ 44. Like the October 1 Agreement, the October 23 Agreement also provided for automatic electronic payments to be made via ACH as described above. See Compl. ¶ 46. Also like the October 1 Agreement, the October 23 Agreement provided that North American's failure to electronically remit the daily repayment amount on more than three occasions would automatically put North American in default under the Agreement and would entitle Power Up to exercise all remedies thereunder. See Compl. ¶ 47. The October 23 Agreement was also guaranteed by Global on its face. Compl. ¶ 44.

II. The Complaint

Plaintiff's Complaint initially set forth ten causes of action, but withdraws four of those claims in the instant motion. See Compl.; Kramer Aff. ¶ 12. Presently before this court are six causes of action. The first two are breach of contract claims against North American – one alleging breach of the October 1 Agreement and one alleging breach of the October 23 Agreement. Those causes of action allege that North American stopped making daily repayments starting on February 5, 2016 and continuing to date. See Compl. ¶¶ 14, 19, 44, 48. Power Up alleges its right to the immediate collection of the balances on the repayment amounts, as well as the associated default and bank default charges, against North American, totaling $109,302.79. See Compl. ¶¶ 24, 53.

The next two claims are asserted against Global as the guarantor on both Agreements. Plaintiff alleges that the Guarantor, jointly and severally responsible for the repayment, has also failed to make the required payments under the Agreements. Compl. ¶¶ 31, 60; Kramer Aff., Exs. B, D, DE [9-3], [9-5].

The remaining two claims are against Gomolski for fraud. Plaintiff asserts that Gomolski defrauded Power Up in order to persuade Plaintiff to enter into the Agreements. Kramer Aff. ¶ 11. Gomolski, as Chief Financial Officer of both North American and Global, provided Power Up with documentation of various financial records to demonstrate North American's ability to make the repayments under the Agreements. See Compl. ¶¶ 36-37, 65-66; Mot. Default J., Exs. A-D. The Complaint alleges that Gomolski knew this information to be false when he provided it, and that Power Up would not have entered into the Agreements but for this false information. ¶¶ 38-39, 67-68.

As to relief sought, Power Up seeks a judgment against all Defendants, jointly and severally, in the amount of $109,302.79. See Kramer Aff. ¶ 14.

III. Procedural History

The instant action was commenced on March 2, 2016, and the Clerk of the Court issued a summons directed to all Defendants on the same day. See DE[1]-[2]. On March 12, 2016, service was properly made upon all Defendants at their authorized agent's usual place of abode at 2099 Allure Loop, The Villages, Florida. DE [4]-[6]; Mot. Default J., Ex. F, DE [9-7].

None of the Defendants responded or moved in response to the complaint. Accordingly, Plaintiff requested entry of a certificate of default. See DE [7]. The Clerk of the Court noted the Defendants' default on October 4, 2016. See DE [8]. Power Up thereafter moved for entry of a judgment of default, and that motion was referred to this Court for Report and Recommendation. See DE [9]; Referral Order, DE [10].

DISCUSSION

I. Legal Standards for Default

Motions for default judgments are governed by Rule 55 of the Federal Rules of Civil Procedure, which provides for a two-step process. See Fed. R. Civ. P. 55; Priestley v. Headminder, Inc., 647 F.3d 497, 504-05 (2d Cir. 2011). First, the moving party must obtain a certificate of default from the Clerk of the Court. Fed R. Civ. P. 55(a). Once the certificate is issued, the moving party then applies for entry of a judgment of default. Id. R. 55(b).

In the context of a default, all well-pleaded factual allegations in the complaint relating to liability are deemed true. Joe Hand Promotions, Inc. v. El Norteno Rest. Corp., 2007 WL 2891016, at *2 (E.D.N.Y. Sept. 28, 2007) (citing Greyhound Exhibitgroup, 973 F.2d at 158)), cert. denied, 506 U.S. 1080 (1993). The court must still determine, however, whether the well-pleaded allegations establish liability as a matter of law. See City of New York v. Mickalia Pawn Shop, LLC, 645 F.3d 114, 137 (2d Cir. 2011).

If liability is established, the court turns to ascertain damages "with reasonable certainty." Credit Lyonnais Sec., Inc. v. Alcanture, 183 F.3d 151, 155 (2d Cir. 1999). A hearing is not necessarily required, as long as the court can ensure that there is a basis for the damages sought by way of the proposed default judgment. See Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., 109 F.3d 105, 111 (2d Cir. 1997). The Court may satisfy this requirement "upon a review of detailed affidavits and documentary evidence." Cement & Concrete Workers Dist. Council Welfare Fund, Pension Fund, Annuity Fund, Educ. & Training Fund & Other Funds v. Metro Found. Contractors Inc., 699 F.3d 230, 234 (2d Cir. 2012).

II. Liability

A. Breach of Contract and Guaranty Claims Against North American and Global

Because liability is based upon the well-pleaded facts in the complaint and whether the allegation establish liability as a matter of law, this Court must review the pleading elements of a breach of contract claim and those of a fraud claim. In New York, the elements of a breach of contract claim are: (1) the existence of a contract, (2) the performance by the party seeking recovery, (3) nonperformance by the other party, and (4) damages attributable to the breach. RCN Telecom Services, Inc. v. 202 Centre Street Realty LLC., 156 F. App'x 349, 350-51 (2d Cir. 2005) (citing Marks v. New York Univ., 61 F. Supp. 2d 81, 88 (S.D.N.Y. 1999)).

A review of the well-pleaded allegations indicates that Power Up has adequately pled its breach of contract claims against both North American and Global. Power Up alleged the existence of contracts, by way of factoring agreements with North American and their respective guaranty agreements with Global, and provided copies thereof in its Motion for Default Judgment. See Compl. ¶¶ 15, 44; Mot. Default J., Exs. A-D. Power Up properly alleges its performance under the contracts by way of advancing monies to North American. See Kramer Aff. ¶ 11. The Complaint alleges North American's nonperformance, and Global's nonperformance as guarantor, by way of their failure to make the agreed upon repayments after February 5, 2016. Compl. ¶¶ 19, 48. Finally, Power Up alleges that it suffered damages in the amount that North American and Global are still required to pay under the contracts. Pursuant to the guaranties of the Agreements, which the Defendants signed, Global is jointly and severally liable for the repayment obligations thereunder. See Mot. Default J., Exs. B, D.

B. Fraud Claims Against Gomolski

In New York, a corporate officer who commits a tort, even if it's in the course of his duties on behalf of the corporation, may be held individually liable. See Bano v. Union Carbide Corp., 273 F.3d 120, 131 (2d Cir. 2001); Leon v. Shmukler, 992 F. Supp. 2d 179, 194 (E.D.N.Y. 2014). To state a claim for fraud under New York law, a plaintiff must allege: (1) a material misrepresentation or omission of a fact, (2) knowledge of that fact's falsity, (3) intent to induce reliance, (4) reasonable reliance by the plaintiff, and (5) damages. See Financial Guar. Ins. Co. v. Putnam Advisory Co., LLC, 783 F.3d 395, 402 (2d Cir. 2015); Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 170 (2d Cir. 2015) (citations omitted). Here, the Plaintiff properly alleges misrepresentations in financial documents about the Defendants' financial ability to make the repayments in conformity with the Agreements. Compl. ¶¶ 36-38, 65-67. Plaintiff also alleges that Gomolski knew the information in these documents were false when he provided them, in order "to persuade [Power Up] to enter into the agreements" at issue here. Kramer Aff. ¶ 11. The Plaintiff further alleges that it relied upon the misrepresentations when it entered into the Agreements and performed its obligations thereunder, and that it suffered damages in the amount still owed under the Agreements. See Compl. ¶¶ 39-40, 68-69.

The Federal Rules of Civil Procedure also require a plaintiff to plead factual allegations of fraud "with particularity" as to the circumstances surrounding the fraud. Fed. R. Civ. P. 9(b). This "particularity" includes specifying: (1) what the fraudulent misrepresentation was, (2) who the speaker was, (3) when and where the misrepresentation was made, and (4) why the misrepresentation was fraudulent. Lerner v. Fleet Bank. N.A., 459 F.3d 273, 290 (2d Cir. 2006). A defendant's fraudulent intent, however, may be alleged generally, so long as the plaintiff alleges "facts that give rise to a strong inference of fraudulent intent." Allstate Ins. Co. v. Afanasyev, 2016 WL 1156769, at *11 (E.D.N.Y. 2016) (quoting Lerner, 459 F.3d at 290).

Power Up specified that the fraudulent misrepresentations were information contained in bank statements, accounting reports, and tax returns that Gomolski personally provided to them on behalf of North American and Global. Kramer Aff. ¶ 11. Gomolski allegedly provided these documents before each respective Agreement was made, and they were fraudulent because they falsely purported North American to be financially capable of making the repayments under the Agreements. Compl. ¶¶ 36, 65; Kramer Aff. ¶ 11. Since these facts "give rise to a strong inference of fraudulent indent," Power Up's well-pleaded allegations meet the particularity requirements of Rule 9(b), and are therefore sufficient to establish Gomolski's liability for fraud concerning both Agreements at issue.

III. Damages

Having found that Plaintiff has adequately alleged that defendants North American and Global are liable for breach of contract and defendant Gomolski liable for fraud, the Court assesses the damages to which Plaintiff is entitled. Plaintiff has waived legal fees and prejudgment interest, so the Court will only assess actual damages suffered. See Kramer Aff. ¶ 12.

Under New York law, a party injured by a breach of contract is entitled "to be placed in the position it would have occupied had the contract been fulfilled according to its terms." Merrill Lynch & Co. Inc. v. Allegheny Energy, Inc., 500 F.3d 171, 185 (2d Cir. 2007) (citing Boyce v. Soundview Tech. Group, Inc., 464 F.3d 376, 384 (2d Cir. 2006)). In the case at bar, the affidavit and documentary evidence annexed to Plaintiff's Motion for Default Judgment are sufficient for the Court to determine damages without an evidentiary hearing. See Metro Found. Contractors Inc., 699 F.3d at 234; see also McLean v. Wayside Outreach Dev. Inc., 624 F. App'x 44, 45 (2d Cir. 2015) (finding no abuse of discretion when the district court, without holding an evidentiary hearing, determined damages with the aid of a single affidavit "only partially based upon real numbers.").

If both Agreements had been fully performed, North American would have paid Plaintiff $76,700 for the October 1 Agreement, and $69,000 for the October 23 Agreement. In addition, once North American blocked payments to Plaintiff through the ACH system, it became obligated to pay Plaintiff a $5,000 default fee for each Agreement and a $2,500 bank default charge for each Agreement. Of this collective $160,700 owed to Plaintiff, North American has repaid $51,397.21, leaving it with $109,302.79 still owed to Plaintiff as alleged in the Complaint. See Compl. ¶¶ 21-24, 50-53; Kramer Aff. ¶¶ 7, 10, 14. Pursuant to the signed Guaranty forms, Defendant Global is also liable, jointly and severally, for the amount owed to Plaintiff under the Agreements. See Mot. Default J., Exs B, D.

As for Defendant Gomolski's liability for fraud, the default remedy for fraud in New York is an award of compensatory damages. "[U]nder New York's longstanding out-of-pocket rule, damages for fraud are to be calculated to compensate plaintiffs for what they lost because of the fraud…." See Matana v. Merkin, 989 F. Supp. 2d 313, 321 (S.D.N.Y. 2013) (internal quotations omitted); accord First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 768 (2d Cir. 1994) (holding that "[t]he general rule for fraud damages is that the defrauded plaintiff may recover out-of-pocket losses caused by the fraud"). Here, as pleaded, Defendant Gomolski's fraudulent misrepresentations caused Plaintiff to suffer the economic loss of Defendant North

American's breaches of each Agreement. See Kramer Aff. ¶ 11. Under New York law, as discussed above, Defendant Gomolski is also individually liable for the economic harm suffered by Plaintiff.

CONCLUSION

For the foregoing reasons the Court respectfully recommends that Plaintiff's motion for a default judgment be granted and that Plaintiff be awarded damages against all Defendants, jointly and severally, in the amount of $109,302.79.

OBJECTIONS

A copy of this Report and Recommendation is being provided to Plaintiff's counsel via ECF. Furthermore, the Court directs Plaintiff's counsel (1) to serve a copy of this Report and Recommendation by first class mail to Defendants at their last known addresses, and (2) to file proof of service on ECF within two days. Any written objections to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this report. 28 U.S.C. § 636(b)(1) (2006 & Supp. V 2011); Fed. R. Civ. P. 6(a), 72(b). Any requests for an extension of time for filing objections must be directed to the district judge assigned to this action prior to the expiration of the fourteen (14) day period for filing objections. **Failure to file objections within (14) days will preclude further review of this report and recommendation either by the District Court of Court of Appeals.** Thomas v. Arn, 474 U.S. 140, 145 (1985) ("[A] party shall file objections with the district court or else waive the right to appeal."); Caidor v. Onondaga Cnty., 517 F.3d 601, 604 (2d Cir. 2008) ("[F]ailure to object timely to a magistrate's report operates as a waiver of any further judicial review of the magistrate's decision.").

Central Islip, New York
July 26, 2017

/s/ Anne Y. Shields
Anne Y. Shields
United States Magistrate Judge